



BRB No. 14-0392 BLA

WANDA F. BOWLING)	
(Widow of HARLIE BOWLING))	
)	
Claimant-Respondent)	
v.)	
)	
SCOTT COAL COMPANY)	DATE ISSUED: 07/10/2015
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Acting Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2012-BLA-5362) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a survivor's claim filed on October 6, 2010.

After crediting the miner with 19.4 years of qualifying coal mine employment,¹ the administrative law judge found that the miner had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant² invoked the rebuttable presumption that the miner's death was due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.³ 30 U.S.C. §921(c)(4).⁴ The administrative law judge further found that employer did not rebut the presumption. In finding that employer did not rebut the presumption, the administrative law judge applied the doctrine of collateral estoppel to preclude relitigation of the issue of the existence of clinical pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the doctrine of collateral

¹ The record reflects that the miner's last coal mine employment was in Tennessee. Director's Exhibits 1-4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

² Claimant is the surviving spouse of the miner, who died on February 18, 2006. Director's Exhibit 9.

³ Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner's death was due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

⁴ The amendments also revived Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that a survivor of a miner who was determined to be eligible to receive benefits at the time of his or her death is automatically entitled to receive survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l). The miner filed four claims during his lifetime, all of which were finally denied. Director's Exhibits 1-4. Thus, claimant cannot benefit from this provision, as the miner was not determined to be eligible to receive benefits at the time of his death.

estoppel precludes employer from contesting whether the miner suffered from clinical pneumoconiosis. Employer also argues that the administrative law judge applied an improper rebuttal standard. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, contending that the administrative law judge applied an incorrect standard in determining whether employer rebutted the Section 411(c)(4) presumption, and requesting that the Board remand the case for the administrative law judge to apply the proper rebuttal standard.⁵

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Benefits are payable on survivors' claims when the miner's death is due to pneumoconiosis. See 20 C.F.R. §§718.1, 718.205; *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, the presumption relating to complicated pneumoconiosis set forth at 20 C.F.R. §718.304 is applicable, or the Section 411(c)(4) presumption is invoked and not rebutted. 20 C.F.R. §718.205(b)(1)-(4).

Because claimant invoked the presumption of death due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both legal and clinical pneumoconiosis,⁶ or by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2). The administrative law judge found that employer failed to establish rebuttal by either method.

⁵ Employer does not challenge the administrative law judge's finding that claimant invoked the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4). This finding is, therefore, affirmed. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁶ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge noted that, in the decision denying the miner's 2001 subsequent claim, Administrative Law Judge Edward Terhune Miller found that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order at 5; Director's Exhibit 4. The administrative law judge, therefore, determined that employer was precluded from relitigating the issue of the existence of clinical pneumoconiosis in the survivor's claim. *Id.* The administrative law judge, therefore, found that employer could not establish that the miner did not have clinical pneumoconiosis. Decision and Order at 5; *see* 20 C.F.R. §718.305(d)(2)(i)(B).

Employer argues that the administrative law judge erred in finding the doctrine of collateral estoppel precluded it from establishing that the miner did not suffer from clinical pneumoconiosis. We agree. Under the doctrine of collateral estoppel, "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). The United States Court of Appeals for the Sixth Circuit has held that the following four elements are required for the doctrine to apply: "(1) the precise issue must have been raised and actually litigated in the prior proceedings; (2) the determination of the issue must have been necessary to the outcome of the prior proceedings; (3) the prior proceedings must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Ark. Coals, Inc. v. Lawson*, 739 F.3d 309, 320-21, 25 BLR 2-521, 2-543 (6th Cir. 2014); *see also Smith v. S.E.C.*, 129 F.3d 356, 362 (6th Cir. 1997).

Although Judge Miller found that the evidence established the existence of clinical pneumoconiosis in the miner's claim, he further found that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and therefore denied benefits. Director's Exhibit 4. Pursuant to claimant's appeal, the Board affirmed Judge Miller's denial of benefits, specifically affirming his finding that the evidence did not establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *H.B. [Bowling] v. Scott Coal Co.*, BRB No. 08-0236 BLA (Oct. 29, 2008) (unpub.). In light of its affirmance of Judge Miller's finding pursuant to 20 C.F.R. §718.204(c), the Board specifically held that it was not necessary to address employer's challenge to Judge Miller's finding that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a).⁷ *Id.*

⁷ Claimant subsequently filed two requests for modification of the miner's claim, each of which was denied by the district director. Director's Exhibit 4.

Because benefits were denied in the miner's claim, the doctrine of collateral estoppel is not applicable, as the determination of the existence of pneumoconiosis was not necessary to support the judgment. *Lawson*, 739 F.3d at 320-21, 25 BLR at 2-543; *Smith*, 129 F.3d at 362. Thus, the administrative law judge erred in determining that the doctrine of collateral estoppel precludes employer from establishing that the miner did not suffer from clinical pneumoconiosis. We, therefore, remand the case to the administrative law judge for consideration of whether employer can establish rebuttal of the Section 411(c)(4) presumption by establishing that the miner did not suffer from clinical pneumoconiosis. 20 C.F.R. §718.305(d)(2)(i).

Employer also argues that the administrative law judge erred in finding that the opinions of Drs. Jarboe and Rosenberg were insufficient to establish that the miner did not suffer from legal pneumoconiosis. After noting that "neither Dr. Jarboe nor Dr. Rosenberg account for [the miner's] 19 years of coal mine employment exposure," the administrative law judge found, without further elaboration, that their opinions were "unreasoned." Decision and Order at 6. We agree with employer that the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Consequently, on remand, should the administrative law judge find that employer has established that the miner did not suffer from clinical pneumoconiosis, he must reconsider whether employer has established that the miner did not suffer from legal pneumoconiosis. *Id.*

We also agree with employer and the Director that the administrative law judge misstated the standard for rebuttal of the Section 411(c)(4) presumption, stating that employer must establish that the miner's "disability did not arise out of, or in connection with, coal mine employment." Decision and Order at 3. If employer is unable to establish both that the miner did not have legal and clinical pneumoconiosis, employer can rebut the Section 411(c)(4) presumption only by establishing that "no part of the miner's death was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(2)(ii). Consequently, should the administrative law judge, on remand, find that employer cannot establish that the miner did not suffer from legal and clinical pneumoconiosis, he must determine whether employer can establish that no part of the miner's death was caused by pneumoconiosis as defined in 20 C.F.R. §718.201.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge